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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

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Commission Inquiry on  
Competitive Bidding Process  
For Report to Congress

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WT Docket No. 97-150

To: The Commission

COMMENTS OF UTC

UTC, The Telecommunications Association (UTC), hereby submits its comments in response to the Federal Communications Commission's (Commission) July 2, 1997, *Public Notice*, FCC 97-232, on the competitive bidding process. Pursuant to Section 309(j)(2) of the Communications Act, the FCC is conducting a public inquiry regarding the use of competitive bidding to award licenses to determine whether competitive bidding has improved the efficiency and effectiveness of the licensing process, facilitated the introduction of new technologies, addressed the needs of rural spectrum users and provided opportunities for participation by small businesses, rural telephone companies and minority- and women-owned businesses. UTC's comments address how the Commission's exercise of its competitive bidding authority has affected utilities, pipelines and other similarly situated private radio licensees.

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UTC is the national representative on communications matters for the nation's electric, gas, water and steam utilities, and natural gas pipelines. UTC's members provide public safety- and public service-related services in all fifty (50) states. UTC's members range in size from large combination electric-gas-water utilities, which serve millions of customers, to smaller rural electric cooperatives and water districts, which serve only a few thousand customers each. Serving on UTC's Board of Directors are representatives from its affiliated trade associations, including:

- American Gas Association
- American Public Power Association
- American Water Works Association
- Edison Electric Institute
- Interstate Natural Gas Association of America
- National Rural Electric Cooperative Association

All utilities and pipelines rely on reliable and secure communications to assist them in carrying out their obligations to provide service to the public. The distinctive operating characteristics of utility and pipeline services (unique operating territories, the need for high security and reliability, etc.) requires that these entities maintain internal radio systems, the operation of which has been affected by the Commission's policies relating to competitive bidding. UTC is therefore pleased to submit its comments in this matter.

## **I. The FCC's Exercise of Competitive Bidding Authority Has Adversely Affected Private Radio Users**

In the *Public Notice*, the Commission maintains that auctions have sped new technologies and services to the wireless communications marketplace. UTC strongly disagrees that the FCC's exercise of auctioning authority has resulted in the speedy introduction of new technologies for all users. While auctions arguably may have resulted in the faster deployment of certain commercial wireless technologies,<sup>1</sup> the introduction of auctions and the Commission's subsequent reluctance to allocate spectrum for non-commercial (non-auctionable) services has substantially hampered the deployment of new private technologies.

Utilities and pipelines need access to new spectrum for new and innovative applications. Advanced information networks are needed to provide monitoring and control functions and to face the challenges presented by changes in the utility industry and the regulatory environment. New wireless solutions are needed to protect the electric grid, ensure compliance with environmental regulations and ensure the safe and efficient provision of electricity, natural gas and water. However, new private technologies generally have not been made available to these critical industries due to the Commission's preoccupation with auctions.

In fact, the Commission has delayed the allocation of spectrum previously identified for private use and has subsequently established or proposed new rules that subject this spectrum to auctions. The reclassification of private bands as commercial has not only resulted in a

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<sup>1</sup> Some applicants for Personal Communications Service (PCS) licenses may disagree. The licensing of this service was not completed until nearly three years after the licensing rules were established.

reduction of spectrum for new private technologies, but it has also substantially delayed the licensing process. For example:

- 220-222 MHz Non-Commercial Licenses. In 1991, the Commission adopted rules for the assignment of commercial and non-commercial nationwide licenses. Pursuant to these rules, UTC established a coalition of utility companies to bid for a license designated for nationwide non-commercial use later that same year. This coalition, known as the Utility Cooperative Communications Service, was intended to provide advanced communications services and interoperability capabilities for its members. However, the non-commercial licenses were never issued. Instead, in March 1997 the Commission adopted new rules allocating these channels for commercial use and subjecting them to competitive bidding.<sup>2</sup>
- 932/941 MHz MAS Channels. In July 1991, the Commission adopted rules establishing much-needed additional spectrum for multiple address systems (MAS). These systems would support a variety of telemetry and control services needed by utilities and pipelines. However, the FCC delayed for almost six years before finally proposing to do away with the established rules in favor of new rules which would subject licenses in these bands to auctions.<sup>3</sup>

It is clear, therefore, that the Commission's exercise of competitive bidding authority has adversely impacted private wireless users and has hampered the development and deployment of advanced private wireless systems.

## **II. The Commission Has Ignored Statutory Mandates That Protect Private Users**

The Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993, establishes a number of safeguards against the unrestricted use of spectrum auctions. These safeguards are designed to ensure that sound spectrum management policies, not revenue considerations, determine how spectrum is allocated and licensed. For example, Section 309(j)(6)(E) states that the Commission's competitive bidding authority does not "relieve the

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<sup>2</sup> *Third Report & Order and Fifth Notice of Proposed Rulemaking*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253 (released March 12, 1997).

Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.” In addition, Section 309(j)(7) prohibits the FCC from basing a finding of public interest, convenience and necessity regarding the assignment of bands of frequencies on the expectation of Federal revenues from auctions.

The Commission has virtually ignored these provisions. In the *Memorandum Opinion and Order on Reconsideration* regarding the development of SMR systems in the 800 MHz band, the Commission rejected the arguments of petitioners urging the Commission not to introduce auctions into this band unless alternative licensing methods were considered to avoid exclusivity pursuant to Section 309(j)(6)(E). The Commission rejected this argument summarily, stating that it had already evaluated the appropriateness of other licensing methods and concluded that they were not in the public interest.<sup>4</sup> However, the Commission did not describe the engineering or other methods it considered (other than first-come, first-served) or why these methods were deficient.

The *Second Report and Order* in the 800 MHz proceeding provides yet another example of Commission’s refusal to appropriately examine engineering and other solutions to avoid mutual exclusivity. In this decision, the FCC denied the proposal proffered by some industry segments that would have avoided mutual exclusivity through negotiations. While UTC disagreed with the “industry” proposal on other grounds, UTC was troubled with the off-hand

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<sup>3</sup> *Notice of Proposed Rulemaking*, WT Docket No. 97-81 (released February 27, 1997).

<sup>4</sup> *Memorandum Opinion and Order on Reconsideration*, PR Docket 93-144, GN Docket No. 93-252, PP Docket No. 93-253. para. 36 (released July 10, 1997).

way in which the Commission skirted the statutory requirement to avoid mutual exclusivity. Characterizing the use of negotiations rather than auctions as presenting a “windfall,” the FCC rejected the industry proposal. Apparently, in the Commission’s view any solution that avoided auctions was contrary to the public interest.

Other examples exist demonstrating how the Commission has performed feats of logical acrobatics to bring its decisions in line with statutory requirements. The Commission’s actions with regard to the 932/941 MHz MAS bands are a good example. The Commission has proposed to return previously filed applications subject to lottery and to auction licenses in this band because a “preliminary examination” of applications suggested that the majority of applicants had “seemingly” proposed to use their systems for commercial purposes.<sup>5</sup> Based on this tentative speculation, and in spite of evidence of a current and growing need for private MAS allocations, the Commission found that the band would be used for subscriber-based commercial services and proposed to return these applications and to auction licenses in this band. The Commission is not proposing alternative solutions that do not involve auctions.

The Commission has apparently ignored the statutory provisions that were enacted to promote the use of the spectrum by a variety of users, both commercial and private. As a result, many entities, including utilities and pipelines, have been unable to secure adequate spectrum for their vital internal operations.

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<sup>5</sup> *NPRM*, WT Docket No. 97-81, para. 7.

### **III. Congress Has Provided Even Clearer Guidance to the Commission Regarding the Protection and Promotion of Private Systems**

While UTC has been concerned about the treatment of private radio users and the lack of necessary spectrum for internal use by utilities and pipelines, UTC is confident that the guidance provided by Congress in the recently-passed Balanced Budget Act of 1997 ('97 Budget Act) will assist the Commission in promulgating equitable rules for use of the spectrum by all users. In the '97 Budget Act, Congress enacts special protections for utilities, pipelines, railroads and other public safety users of spectrum.

First, the '97 Budget Act exempts internal systems operated by utilities and pipelines from auctions. The Act exempts from auctions any licenses or permits that the Commission issues:

- (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—
  - (i) are used to protect the safety of life, health, or property; and
  - (ii) are not made commercially available to the public;

Clarifying the application of this statutory language to utilities and pipelines is the official report accompanying the '97 Budget Act in which Congress states that “the exemption from competitive bidding authority for ‘public safety radio services’ includes ‘private internal radio services’ used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities

protect the safety of life, health, or property and are not made commercially available to the public.”<sup>6</sup>

Congress also re-emphasized its intention for the Commission to examine engineering and other solutions to avoid mutual exclusivity.

[T]he conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission’s obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.

Finally, Congress recognized the importance of private wireless services and specifically tasked the Commission and the NTIA to consider allocations of spectrum for private wireless use. “[T]he conferees expect the Commission and the NTIA to consider the need to allocate additional spectrum for shared or exclusive use by private wireless services in a timely manner.”

### **Conclusion**

The exercise of competitive bidding authority by the Commission has adversely affected private wireless users, particularly utilities and pipelines. These users have faced both licensing delays and the loss of spectrum as a result of the Commission’s propensity to allocate licenses for subscriber based systems via competitive bidding. UTC urges the Commission to follow existing and pending statutory mandates that protect the public interest in maintaining critical private communications services.

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<sup>6</sup> Joint Explanatory Statement of the Committee of Conference, *Congressional Record* at p. H6173 (July 29, 1997).




**WHEREFORE, THE PREMISES CONSIDERED,** UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

**UTC**

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